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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

CLARA L. WASHINGTON,

Petitioner,

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITION

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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To the Honorable Supreme Court:

REFERENCE TO OPINION BELOW

The opinion of the Court of Civil Appeals, 14th Supreme Judicial District is reported in 436 S.W. 2d 554. The Supreme Court of Texas refused the application for writ of error, without opinion. A copy of the opinion of the Court of Civil Appeals is printed in Appendix A.

JURISDICTION

The date of the judgment of the Supreme Court of Texas sought to be reviewed is March 19, 1969, and the time of its entry was during that day.

Petitioner's motion for rehearing of application for writ of error was overruled on April 16, 1969. The statutory provisions believed to confer on this Court jurisdiction to

review the judgment in question by writ of certiorari is 28 U.S.C., section 1257(3) and 2101(c).

QUESTION PRESENTED

Is fair administration of justice by state courts required by the due process of law clause, and the equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is Section 1, Amendment XIV, of the Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioner, Clara L. Washington, filed in the District Court of Harris County, a petition for bill of review of a summary judgment rendered on February 24, 1966 by the trial court in a suit on a life insurance policy. Suit for bill of review was filed on January 29, 1968, and on April 30, 1968, respondent, Golden State Mutual Life Insurance Company, filed motion for summary judgment. The trial court granted Respondent's motion for summary judgment on June 30, 1968, and denied Petitioner any and all relief.

The stage in the proceedings in the court of first instance at which, and the manner in which, the federal question

sought to be reviewed were raised, and the manner in which they were passed upon by the court were as follows:

1. By exceptions to the orders of the district court directing the district clerk not to issue the requested commissions to take depositions. (Tr. 34; Tr. 35; Tr. 36). The Court of Civil Appeals upheld the order of the district court. By Third assignment of error in appellant's motion for rehearing in court of civil appeals. Court of Civil Appeals overruled appellant's motion for rehearing. By point of error, Third Point, in application for writ of error to Supreme Court of Texas, which application was refused, no reversible error. By third ground, in motion for rehearing, which was overruled by the Supreme Court of Texas.

2. In motion for new trial, fourth ground; (Tr. 58, 59) the court erred in not setting aside its judgment rendered on the 31st day of January, 1966, granting to the defendant in case No. 651,730, a summary judgment on only nine (9) days notice to the plaintiff and the adverse party, instead of ten (10) days notice as is required by Rule 166-A, of the T.R.C.P., for such judgment was void, and in violation of due process of law and equal protection of the laws, under Sec. 1, 14th Amendment to the U. S. Constiution. The trial court overruled the motion for new trial. By point of error, Fourth point, in brief of appellant in court of civil appeals, which court affirmed the judgment of the trial court. By assignment of error, Fourth assignment, in motion for rehearing in Court of Civil Appeals, which court overruled such motion. By point of error, Fourth point, in application for writ of error in Supreme Court of Texas, which application was refused, No reversible error. By fourth ground, in motion for rehearing, which was overruled by the Supreme Court of Texas.

REASONS FOR GRANTING THE WRIT

A State court has decided a federal constitutional question of substance, either not determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

The federal constitutional question is of importance in the administration of justice.

1. The court of civil appeals stated in its opinion, 436 S.W. 2d 556, "It is not the purpose of a bill of review to relitigate issues decided in a former case whether the court committed error or not unless the prior judgment can be said to be void. We hold that the prior judgment was not void."

Section 1, of Amendment XIV, to the Constitution of the United States forbids a State from depriving any person of property without due process of law. It is respectfully submitted to the Court that the granting of a summary judgment by the trial court to the defendant in the original case on only nine (9) days notice to the opposite party where the T.R.C.P. require ten (10) days notice to the opposite party, made such summary judgment void. In *Garcia* v. *Parr*, 316 S.W. 2d 396; and in *Gardner* v. *Martin, et al*, 345 S.W. 2d 274, the Supreme Court of Texas held that in order for a moving party to be granted a summary judgment, all of the requirements prerequisite to obtaining same must be strictly complied with.

As all of the requirements prerequisite to obtaining the summary judgment were not strictly complied with, and as the opposite party had not been given ten (10) days notice of the motion for summary judgment as required by Texas Rules of Civil Procedure, Rule 166-A, the motion was not ripe for hearing, and the trial court committed fundamental error in granting the summary judgment.

Appellate courts can consider and determine whether the error made by the trial court will be considered as fundamental error, and if the error was fundamental error, such error can be set aside by any appellate court.

In *McCauley* v. *Consolidated Underwriters,* (1957) 304 S.W. 2d 265, 266, the Supreme Court of Texas said, "When the record affirmatively and conclusively shows that the court rendering the judgment was without jurisdiction of the subject matter, the error will also be regarded as fundamental."

2. In *Holland* v. *Foley Brothers Dry Goods Company,* 324 S.W. 2d 430, 432 (Application for writ of error refused by Supreme Court of Texas), the Court of Civil Appeals stated on page 432, "Hearing was actually had on the 27th, but no decision was made. No decision having been made on the 27th, the motion for new trial was overruled by operation of law at the expiration of that day."

The attorneys for the appellees in the *Holland* v. *Foley Brothers Dry Goods Company* case, and the case was decided in favor of the appellees, was the law firm of Baker, Botts, Andrews and Shepherd.

In the prior case of *Clara L. Washington* v. *Golden State Mutual Life Insurance Company,* wherein the trial court granted a motion for summary judgment to the defendant on only nine (9) days notice of such motion to the opposite party, the attorneys for the defendant, Golden State Mutual Life Insurance Company, were Baker, Botts, Shepherd & Coates.

By applying the rule that decided the case in *Holland* v. *Foley Brothers Dry Goods Company,* 324 S.W. 2d 430 to the prior case of *Clara L. Washington* v. *Golden State Mutual Life Insurance Company,* 405 S.W. 2d 856, 408 S.W. 2d 227, it then appears that the case would have been decided in

favor of Clara L. Washington, and against the appellee and respondent represented by the law firm of Baker, Botts, Shepherd & Coates.

Since the rule announced in the case of *Holland* v. *Foley Brothers Dry Goods Company*, 324 S.W. 2d 430, was not followed in *Clara L. Washington* v. *Golden State Mutual Life Insurance Company*, 405 S.W. 2d 856, 408 S.W. 2d 227, and another rule from another case was followed, thus enabling the case to be decided in favor of the appellee and respondent represented by Baker, Botts, Shepherd & Coates (and in the request for a commission to take deposition upon written interrogatories (Tr. 25), Interrogatories 15, 16, 17, and 18), the questions there were asked to find out if the law firm of Baker, Botts, Shepherd & Coates was the same law firm that represented both appellees in the above cases, and whether the said law firm was a large law firm. It appears that a question is presented here as to whether the State of Texas through its state courts has denied to the petitioner in the prior case and in the instant case, the equal protection of the laws under Section 1, of the Fourteenth Amendment to the Constitution of the United States.

3. As the appellate courts of Texas held in *Washington* v. *Golden State Mutual Life Insurance Company*, 405 S.W. 2d 856, and in 408 S.W. 2d 227, that their court lacked jurisdiction because the appeal bond was filed late, one day late (Tr. 6). So, it is respectfully submitted to the Court that the trial court lacked jurisdiction of the subject matter in the prior case of *Washington* v. *Golden State Mutual Life Insurance Company*, on appeal reported in 405 S.W. 2d 856, and in 408 S.W. 2d 227, because the summary judgment was granted to the defendant on only nine (9) days notice to the opposite party, and one day prior to the time that the hearing of the motion for summary judg-

ment was ripe for hearing. (Tr. 2-9; 40-45) And therefore the trial court committed fundamental error, and due process of law and equal protection of the laws has been denied to the petitioner under Section 1, of the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, petitioner prays that the Supreme Court of the United States grant this petition for a Writ of Certiorari, and petitioner further prays for costs of court in all state courts and in the Supreme Court of the United States.

Respectfully submitted,

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Affirmed, and Opinion filed December 11, 1968.

APPENDIX

No. 185

CLARA L. WASHINGTON,

Appellant,

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,

Appellee.

APPEAL FROM DISTRICT COURT OF HARRIS COUNTY

Appellant, Clara L. Washington, filed in the District Court of Harris County a petition for bill of review of a summary judgment rendered on February 24, 1966 by the trial court in a suit on a life insurance policy. Suit for bill of review was filed on January 29, 1968, and on April 30, 1968, appellee, Golden State Mutual Life Insurance Company, filed motion for summary judgment. The trial court granted appellee's motion for summary judgment on June 3, 1968 and denied Mrs. Washington, appellant, any and all relief. The appeal is from the trial court's summary judgment in the suit seeking bill of review.

This case involves a prior suit filed by Clara L. Washington against Golden State Mutual Life Insurance Company on August 19, 1964. See Washington v. Golden State Mutual Life Ins. Co., 405 S.W.2d 856, (Tex. Civ. App.), err. ref. per curiam, 408 S.W.2d 277, (Tex. Sup. 1966), cert. denied, 386 U.S. 1007, rehearing denied, 387 U.S. 938 (1967). In the prior case the same defendant moved for summary judgment, and on January 31, 1966, the trial judge considered affidavits and argument of counsel on the merits and announced that it would grant the motion. Up to this

time appellant had not raised any objection to the judge's proceeding with the hearing. However, later the same day appellant filed a motion in which she claimed that the judge should not have proceeded with the hearing on appellee's motion for summary judgment because she had not had ten days notice of hearing provided for by the Texas Rules of Civil Procedure, and that summary judgment was improper as a matter of substantive law. On February 24, 1966, judgment that appellant take nothing by reason of her suit against appellee was signed and entered, and appellant attempted to perfect an appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas.

Appellee moved the Court of Civil Appeals to dismiss the appeal for want of jurisdiction because of the alleged late filing of appellant's appeal bond. On July 7, 1966, the First Court of Civil Appeals filed a written opinion holding that it had acquired no jurisdiction because of the late filing of appellant's appeal bond and ordering the appeal dismissed for want of jurisdiction. Washington v. Golden State Mutual Life Ins. Co., 405 S.W.2d 856, (Tex. Civ. App.). Mrs. Washington, the appellant, then applied to the Supreme Court of Texas for a writ of error, and on November 9, 1966 that Court filed a written opinion approving the opinion and the holding of the Court of Civil Appeals and refusing the application for writ of error. Washington v. Golden State Mutual Life Ins. Co., 408 S.W.2d 227, (Tex. Sup. Ct.). Appellant unsuccessfully sought review by the United States Supreme Court.

In the present suit which seeks bill of review appellant set out the original petition filed August 19, 1964 and, in effect, reargued the merits of the prior appeal and set out the history of the prior case. Appellee, as above stated, moved for summary judgment, asserting that appellant's

failure to perfect an appeal from the judgment of February 24, 1966 defeated her right to a bill of review.

Appellant here contends that the trial court erred in rendering summary judgment because there was on file affidavits to show genuine issues of fact; in not hearing the entire controversy in one proceeding and determining it on its merits; in denying request of appellant for commission to take depositions; and that the trial court erred in the prior suit because appellant was allowed only nine days notice of appellee's motion for summary judgment, which rendered such prior judgment void and invalid by reason of Rule 166-A, T.R.C.P., and the due process and equal protection clauses of the Texas and United States Constitutions. Further contention is made that the trial court erred in failing to allow bills of exception, though a summary judgment was involved.

The affidavits on file and the interrogatories denied by the trial court were directed generally at matters which occurred in the prior case, and they could have had no relevance to the controlling point here. The interrogatories were directed at the trial judge and one of the attorneys for appellee, and none of them dealt with fraud, accident or wrongful act of appellee unmixed with any fault or negligence on the part of appellant, particularly in connection with appellant's failure to perfect her appeal in the prior case.

As has often been stated by the courts, before a litigant can successfully set aside a final judgment, he must allege and prove, within the time allowed, a meritorious cause of action or defense to the cause of action alleged to support the judgment, *and* which he was prevented from making by extrinsic fraud, accident or wrongful act of the opposite party, *and* unmixed with any fraud or negligence on his own part. French v. Brown, 424 S.W.2d 893, (Tex.

Sup.); Hanks v. Rosser, 378 S.W.2d 31, (Tex. Sup.); Alexander v. Hagedorn, 226 S.W. 2d 996, (Tex. Sup.); Trinity River Authority of Texas v. McMurrey, 411 S.W.2d 422, 425, (Tex. Civ. App.), writ ref., n.r.e.; Johnson v. Potter, 384 S.W. 2d 747, (Tex. Civfl App.), no writ hist.; 34 Tex. Jur. 2d, Sec. 205, p. 48. The relief afforded by bill of review must be for sufficient cause under Rule 329b (5) of the Texas Rules of Civil Procedure.

As the court stated in Birge v. Conwell, 105 S.W.2d 407, 408-409, (Tex. Civ. App.), writ ref.:

> "The bill of review is an equitable remedy and cannot be used to take the place of a motion for new trial, appeal, or writ of error. It cannot be so used during the term of the court when the original case was tried, nor can it be so used after the term has expired, if either of those expedients were available during the term at which the judgment was rendered, unless it be shown that the complainant had a good defense which was prevented by fraud, accident, or the wrongful acts of his adversary. It has never been the law that one who is negligent in the matter of filing and urging a motion for new trial or in perfecting an appeal or writ of error may avoid the consequences through the medium of a bill of review."

See also, Smith v. Ferrell, 44 S.W.2d 962, (Tex. Comm. App.), opinion approved; Lynn v. Hanna, 296 S.W.2d 280, (Tex. Sup.); 34 Tex. Jur. 2d, Sec. 230, p. 101 et seq., and cases there cited.

Appellants' principal contention is that she was not allowed ten days notice as provided by the Texas Rules of Civil Procedure, Rule 166-A, and that the trial court in the prior suit granted summary judgment after the expiration of nine days. But the prior final judgment was not thereby rendered void, although it may have been erroneous, if the court had jurisdiction of the parties, the sub-

ject matter and the power to render the judgment. French v. Brown, supra. It is not the purpose of a bill of review to relitigate issues decided in a former case whether the court committed error or not unless the prior judgment can be said to be void. We hold that the prior judgment was not void.

Since this is a summary judgment proceeding we have kept in mind the rule that the burden of proof lies with appellee in such cases. Great American Reserve Ins. Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41, 47, (Tex. Sup.). All doubts as to the existence of a genuine issue as to a material fact are resolved against the movant. But the facts and admissions show conclusively, and it is undisputed, that the failure of appellant to avail herself of the remedy of appeal of the judgment of February 24, 1966 can be laid to nobody other than appellant. Her failure to perfect the appeal is not unmixed with fault or negligence on her part, and the record is clear in this respect.

A summary judgment may be granted with or without supporting affidavits in a case of this kind. Rule 166-A, T.R.C.P. There can be no material controversy when exhaustion of the legal remedy of appeal has failed under these circumstances, and when such facts are plain from the record. Omissions of this nature are occasionally made by the best of lawyers, but we are powerless to grant relief.

We have examined the entire record carefully, and we can find no error. Appellant's constitutional rights have not been violated.

The judgment of the trial court is affirmed.

/s/ JOHN M. BARRON
Associate Justice

Judgment rendered, and Opinion
filed December 11, 1968.